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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 RONALD CRAWFORD,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting
13 Commissioner of Social Security,

14 Defendant.

CASE NO. C17-5398-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

15 Plaintiff Ronald Crawford proceeds through counsel in his appeal of a final decision of the
16 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
17 Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an
18 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative
19 record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for
20 further administrative proceedings.

21 **FACTS AND PROCEDURAL HISTORY**

22 Plaintiff was born on XXXX, 1949.¹ He has a high school diploma and some college

23 ¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 education, and has worked as a sales associate and contract manager at Home Depot, and as a
2 construction laborer. (AR 54, 193, 298.)

3 Plaintiff protectively applied for DIB in December 2013. (AR 159-65.) His date last
4 insured (DLI) is December 31, 2014. Plaintiff's application was denied initially and upon
5 reconsideration, and Plaintiff timely requested a hearing. (AR 102-04, 106-07, 112.)

6 On September 9, 2015, ALJ David Johnson held a hearing, taking testimony from Plaintiff
7 and a vocational expert. (AR 47-79.) On November 12, 2015 the ALJ issued a decision finding
8 Plaintiff not disabled before his DLI. (AR 30-42.) Plaintiff timely appealed. The Appeals Council
9 denied Plaintiff's request for review on March 31, 2017 (AR 1-9), making the ALJ's decision the
10 final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to
11 this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
18 engaged in substantial gainful activity between his amended alleged onset date and his DLI. (AR
19 32.) At step two, it must be determined whether a claimant suffers from a severe impairment. The
20 ALJ found that Plaintiff's degenerative disc disease, diabetes, hypertension, and obesity were
21 severe through the DLI. (AR 32.) Step three asks whether a claimant's impairments meet or equal
22 a listed impairment. The ALJ found that through the DLI, Plaintiff's impairments did not meet or
23 equal the criteria of a listed impairment. (AR 33.)

1 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
2 residual functional capacity (RFC) and determine at step four whether the claimant has
3 demonstrated an inability to perform past relevant work. The ALJ found that through the DLI,
4 Plaintiff was capable of performing light work, with additional limitations: he can occasionally
5 climb, stoop, kneel, crouch, and crawl. He cannot have concentrated exposure to wetness,
6 pulmonary irritants, or hazards (such as open machinery or unprotected heights). (AR 33.) With
7 that assessment, the ALJ found that through the DLI, Plaintiff was able to perform past relevant
8 work as a sales representative (building equipment). (AR 41-42.)

9 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
10 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
11 adjustment to work that exists in significant levels in the national economy. Because the ALJ
12 found Plaintiff capable of performing past relevant work, the ALJ did not proceed to step five.
13 (AR 41-42.)

14 This Court's review of the ALJ's decision is limited to whether the decision is in
15 accordance with the law and the findings supported by substantial evidence in the record as a
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
17 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
18 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
19 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
20 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
21 2002).

22 Plaintiff argues the ALJ erred in (1) assessing medical opinion evidence, (2) discounting
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1 Plaintiff's subjective testimony, and (3) discounting lay evidence.² Plaintiff also argues that the
2 ALJ's decision should be reversed in light of evidence submitted for the first time to the Appeals
3 Council. The Commissioner argues that the ALJ's decision is supported by substantial evidence
4 and should be affirmed.

5 Medical opinion evidence

6 The ALJ discounted opinions provided by examining physicians Thomas Gritzka, M.D.,
7 and Floyd Sekeramayi, M.D. (AR 40-41.) Plaintiff argues that the ALJ's reasons for discounting
8 these opinions were not specific and legitimate, especially in light of opinions provided by Dr.
9 Gritzka and treating physician's assistant Eric Owen, PAC, to the Appeals Council. The Court
10 will address each disputed opinion in turn.

11 A. Legal standards

12 In general, more weight should be given to the opinion of a treating physician than to a
13 non-treating physician, and more weight to the opinion of an examining physician than to a non-
14 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
15 by another physician, a treating or examining physician's opinion may be rejected only for "clear
16 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
17 Where contradicted, a treating or examining physician's opinion may not be rejected without
18 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
19 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ may reject
20 physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting
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22 ² Plaintiff's opening brief also challenges the ALJ's RFC assessment and step-five findings, but in
23 doing so only reiterates arguments made elsewhere. Dkt. 15 at 2, 16. The Court also notes that the ALJ
did not enter findings at step five, because he found that Plaintiff could perform his past work. (AR 41-
42.) Accordingly, these issues will not be analyzed separately.

1 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
2 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating
3 her conclusions, the ALJ “must set forth [her] own interpretations and explain why they, rather
4 than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

5 Opinions submitted for the first time to the Appeals Council should be reviewed along with
6 the remainder of the record to determine whether the ALJ’s decision is supported by substantial
7 evidence. *See Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012)
8 (“[W]hen the Appeals Council considers new evidence in deciding whether to review a decision
9 of the ALJ, that evidence becomes part of the administrative record, which the district court must
10 consider when reviewing the Commissioner’s final decision for substantial evidence.”).

11 B. Dr. Gritzka

12 Dr. Gritzka examined Plaintiff in March 2015 and provided a narrative opinion report. (AR
13 401-12.) Dr. Gritzka concluded that since his original alleged onset date, Plaintiff could *inter alia*
14 stand/walk for a total of two hours per workday, and sit for a total of two hours per workday. (AR
15 411.)

16 The ALJ summarized Dr. Gritzka’s findings and conclusions, and found that several factors
17 undermined his opinion. (AR 40.) First, the ALJ found that the positive Waddell signs
18 documented by Dr. Gritzka undermine his conclusions, because they indicate that Plaintiff’s pain
19 was not anatomically based, and Dr. Gritzka “does not appear to have accounted for or addressed
20 the Waddell signs when arriving at his opinions.” (AR 40-41.) The ALJ also found that Dr.
21 Gritzka was “somewhat misinformed about the claimant’s history,” apparently referring to
22 Plaintiff’s report to Dr. Gritzka that he did not receive steroid injections, contrary to his reports
23 elsewhere of receiving injections and improvement thereafter. (AR 38, 40.) The ALJ found that

1 Dr. Gritzka's opinion was "somewhat consistent" with other examinations subsequent to
2 Plaintiff's DLI, during a time period where Plaintiff's condition "appears to have worsened[.]"
3 (AR 40.) The ALJ stated that Dr. Gritzka's conclusions were inconsistent with the treatment
4 record during the adjudicated period, which shows "generally conservative" treatment for back
5 pain and inconsistent complaints of carpal tunnel syndrome, neck pain, or knee pain. (*Id.*) The
6 ALJ also found Dr. Gritzka's opinion to be inconsistent with Plaintiff's activities, namely
7 gardening and housework. (*Id.*)

8 Dr. Gritzka wrote a supplemental opinion addressing the ALJ's decision in March 2016,
9 and this addendum was submitted to the Appeals Council. (AR 453-57.) Dr. Gritzka explained
10 that, contrary to the ALJ's findings, Plaintiff did not display positive Waddell signs during his
11 examination, and his testing did not suggest non-anatomic behaviors. (AR 454.) Dr. Gritzka also
12 cited Plaintiff's statement explaining that he did not receive steroid injections to his back,
13 consistent with his report to Dr. Gritzka, but instead received them in his knees. (AR 455 (referring
14 to AR 258).) Dr. Gritzka further opined that Plaintiff's "minimal housework and gardening" was
15 not inconsistent with his opined limitations, and that he was aware of Plaintiff's gardening
16 activities and inability to access the second floor of his home when he rendered his opinion. (AR
17 456-57.) Lastly, Dr. Gritzka noted that he reviewed treatment records that predated Plaintiff's
18 amended alleged onset date, and believes that those records are in fact consistent with his
19 conclusions, contrary to the ALJ's decision. (AR 456.) Plaintiff argues that Dr. Gritzka's
20 clarifications reveal that the ALJ's reasons for discounting Dr. Gritzka's opinion are not supported
21 by substantial evidence.

22 The Commissioner argues that the Court should reject Plaintiff's attempt to rebut the ALJ's
23 decision via Appeals Council evidence, because the supplemental opinion "does not persuasively

1 rebut all of the reasons the ALJ provided for discounting” Dr. Gritzka’s opinion. Dkt. 16 at 11.
2 The Commissioner does not dispute that Dr. Gritzka’s addendum persuasively rebuts the ALJ’s
3 reasoning with regard to the Waddell signs and the steroid injections, however. Dkt. 16 at 10-11.
4 Dr. Gritzka’s supplemental opinion makes clear that the ALJ inaccurately interpreted portions of
5 his first opinion and the medical record, which invalidates significant portions of the ALJ’s
6 analysis. Dr. Gritzka’s supplemental opinion undermines the substantial evidence supporting the
7 ALJ’s interpretation of the first opinion, and a remand to permit the ALJ to consider Dr. Gritzka’s
8 second opinion is warranted.

9 C. Dr. Sekeramayi

10 Dr. Sekeramayi examined Plaintiff in June 2015, after reviewing Dr. Gritzka’s 2015
11 opinion and imaging studies from 2011 and 2014. (AR 414.) Dr. Sekeramayi wrote a narrative
12 opinion report, concluding that *inter alia* Plaintiff was limited to walking/standing less than two
13 hours per day and sitting less than two hours per day, and could lift/carry 20 pounds occasionally
14 and 10 pounds frequently. (AR 414-18.)

15 The ALJ discounted Dr. Sekeramayi’s opinion, finding that it reflected Plaintiff’s current
16 functioning, rather than his limitations during the adjudicated period. (AR 41.)

17 Plaintiff argues that Dr. Sekeramayi provided a longitudinal opinion, reaching back to the
18 adjudicated period, contrary to the ALJ’s decision. Dkt. 15 at 11. To support this argument,
19 Plaintiff notes that Dr. Sekeramayi reviewed imaging studies dating to the adjudicated period, and
20 argues that “Dr. Sekeramayi did not indicate that he was only describing Plaintiff’s current
21 condition or functioning[.]” Dkt. 15 at 11.

22 Plaintiff’s arguments are not persuasive. Dr. Sekeramayi indicated no intent to provide a
23 retrospective opinion, and the imaging studies he reviewed do not address Plaintiff’s functional

1 limitations during the period at issue. A plain reading of Dr. Sekeramayi's report leads to the
2 conclusion that he was evaluating Plaintiff's functional capacity as of the time of the physical
3 evaluation. Plaintiff has not shown that the ALJ erred in finding that Dr. Sekeramayi's opinion
4 was neither retrospective nor consistent with treatment notes addressing Plaintiff's functional
5 limitations dating to the adjudicated period. *See Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir.
6 1995) (holding that although an ALJ may not discount a medical opinion merely because it post-
7 dates the DLI, an ALJ may discount a post-DLI opinion that is inconsistent with pre-DLI
8 evidence); *Capobres v. Astrue*, 2011 WL 1114256, at *5 (D. Ida. Mar. 25, 2011) (explaining that
9 while post-DLI medical evidence cannot be rejected solely as remote in time, it can be rejected on
10 the grounds that the evidence itself is not retrospective). Accordingly, the ALJ's assessment of
11 Dr. Sekeramayi's opinion is affirmed.

12 D. Mr. Owen

13 Mr. Owen submitted a response to questions from Plaintiff's counsel to the Appeals
14 Council. (AR 458-59.) He indicated that he agreed with the conclusions of Drs. Gritzka and
15 Sekeramayi. (*Id.*) Plaintiff argues that Mr. Owen's statement "strengthens" the opinions of Drs.
16 Gritzka and Sekeramayi. Dkt. 15 at 12.

17 Because this case must be remanded to permit the ALJ to consider Dr. Gritzka's
18 supplemental opinion, the ALJ should also consider Mr. Owen's opinion for the first time on
19 remand.

20 Lay evidence

21 The ALJ considered an August 2015 statement from Plaintiff's neighbor, David Davidson,
22 and Mr. Davidson also submitted an additional statement to the Appeals Council. (AR 246-47,
23 256-57.) The ALJ discounted Mr. Davidson's first statement because it described Plaintiff's

1 current functioning, rather than his functioning during the adjudicated period. (AR 39.) The ALJ
2 also found that if Mr. Davidson intended to address the adjudicated period, his statement “is
3 inconsistent with the medical record created at the time and made for the purposes of treatment.”
4 (*Id.*) Plaintiff argues that this reasoning is not accurate nor legally sufficient.

5 A. Legal standards

6 Lay witness testimony as to a claimant’s symptoms or how an impairment affects ability
7 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*
8 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses
9 only upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996).

10 B. Mr. Davidson’s statements

11 Plaintiff argues that, contrary to the ALJ’s decision, Mr. Davidson’s statement was
12 consistent with the opinions of Drs. Gritzka and Sekeramayi, and that Mr. Davidson described
13 Plaintiff’s deterioration over time, thereby addressing the adjudicated period. Dkt. 15 at 13-14.

14 Mr. Davidson’s first statement addresses only Plaintiff’s current functioning, as found by
15 the ALJ, and this is a germane reason to discount it. (AR 246-47.) Mr. Davidson explicitly
16 addressed the adjudicated period in his second statement, however. (AR 256-57.) Because this
17 case must be remanded to permit the ALJ to consider Dr. Gritzka’s supplemental opinion, the ALJ
18 should also consider Mr. Davidson’s second statement for the first time on remand.

19 Plaintiff’s subjective testimony

20 The ALJ discounted Plaintiff’s subjective testimony for a number of reasons, specifically:
21 (1) inconsistency between Plaintiff’s alleged limitations and the objective medical evidence; (2)
22 Plaintiff’s failure to comply with recommended medical treatment; (3) Plaintiff’s brief and
23 conservative treatment; (4) inconsistent between Plaintiff’s activities and alleged limitations; (5)

1 Plaintiff's inconsistent statements regarding his treatment and abilities; (6) the fact that Plaintiff
2 stopped working for reasons other than his impairments; and (7) Plaintiff's receipt of
3 unemployment compensation after his original alleged onset date. (AR 36-39.) In the Ninth
4 Circuit, and ALJ's reasons to discount a claimant's subjective testimony must be clear and
5 convincing. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014) (citing *Molina v. Astrue*,
6 674 F.3d 1104, 1112 (9th Cir. 2012)).

7 Plaintiff notes that his subjective testimony was corroborated by the opinions of Drs.
8 Sekeramayi and Gritzka, Mr. Owen, and Mr. Davidson, and argues that the ALJ's reasons for
9 discounting it were "characterological and too general." Dkt. 15 at 15-16. Plaintiff has not shown
10 error in the ALJ's decision, because he has failed to address or even acknowledge any of the
11 specific reasons provided by the ALJ. Contrary to Plaintiff's argument, the ALJ's reasons were
12 neither characterological nor overly general, but instead constituted specific, clear, and convincing
13 reasons to discount the reliability of Plaintiff's subjective statements.

14 The ALJ's reasons may need to be revisited, however, after the ALJ considers Dr. Gritzka's
15 supplemental opinion, Mr. Owen's opinion, and Mr. Davidson's second statement for the first
16 time. Thus, the ALJ should reconsider Plaintiff's subjective testimony as necessary on remand.


17 CONCLUSION

18 For the reasons set forth above, this matter is REVERSED and REMANDED for further
19 administrative proceedings. The ALJ shall consider Dr. Gritzka's supplemental opinion, Mr.
20 Owen's opinion, and Mr. Davidson's second statement, and, if necessary, revisit his assessment of
21 Plaintiff's subjective testimony.

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1 DATED this 14th day of November, 2017.

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4 Mary Alice Theiler
United States Magistrate Judge